INDEX

Page

Index i

List of Authorities ii

Questions Presented 1

Statement of the Case 2

Reasons for Denying the Writ 5

Response to Plaintiff's Reasons for Granting the Writ 20

Conclusion 26

Prayer 27

Certificate 27

LIST OF AUTHORITIES

Page

B

Barnes v. Norfolk Southern Railway Co., 4th Cir. 333 F.2d 192 9
2B Barron & Holtzoff, § 1075 at 401 7
Basham v. Pennsylvania Railroad, 372 U.S. 699 (1963) 6

D

Davis v. Baltimore & Ohio Railroad, 379 U.S. 671 (1965) 6
Deen v. Gulf, Colorado and Santa Fe Ry. Co., 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 718 23
Dennis v. Denver & Rio Grande Western Railroad, 375 U.S. 208 (1963) 6

E

Ellis v. Union Pacific Railroad Co., 329 U.S. 649 21

F

Fore v. So. Ry. Co., 4th Cir., 178 F.2d 349 24

G

Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108 (1963) 6
Gulf, Colorado and Santa Fe Ry. Co. v. Deen, 275 S.W.2d 529 24

H

Harris v. Pennsylvania Railroad, 361 U.S. 15 (1959) 7

J

Johnson v. Erie Railroad Co., 2nd Cir., 250 F.2d 283 8

L

L & N Ry. Co. v. Davis, 6th Cir., 75 F.2d 849 24
Lavender v. Kurn, 327 U.S. 645, 653 (1945) 7, 15

M

McGivern v. No. Pac. Ry. Co., 8th Cir., 132 F.2d 231 24

LIST OF AUTHORITIES (Continued)

Page

P

Page v. St. Louis Southwestern Ry. Co., 5th Cir., 349 F.2d 820 ..... 2, 8, 25

Paluch v. Erie Lackawana R. R. Co., 387 F.2d 996 ..... 20, 22, 23, 24

Planters Manuf. Co. v. Protection Mut. Ins. Co., 380 F.2d 869 (5th Cir. 1967) 7

R

Rogers v. Missouri Pacific Co., 352 U.S. 500 (1957) 6, 23, 26

T

Teets v. Chicago, South Shore & South Bend Railroad, 238 F.2d 223 (7th Cir.) 9

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1941) 7

Thompson v. Pa. Ry. Co., 6th Cir., 88 F.2d 148 24

W

Webb v. Illinois Central Railroad, 352 U.S. 512 (1957) 7

Western Union Telegraph Co. v. Cokes, 146 Tex. 190, 204 S.W.2d 1977 24

Wilkerson v. McCarthy, 336 U.S. 53 7

Wolfe v. Henwood, 8th Cir., 162 F.2d 998 24

No. 1231

IN THE

SUPREME COURT OF THE UNITED STATES

MANUEL O. DeLaCRUZ, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition For Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

1. Is there evidence to support the findings of the jury that Petitioner (Plaintiff) was negligent?

2. Is there evidence to support the findings of the jury that Petitioner's (Plaintiff's) negligence played any part in bringing about or causing Petitioner's injuries?

3. Was there error in the charge of the Court on damages and can Petitioner (Plaintiff) complain of error in the charge in the absence of an objection to the charge?

STATEMENT OF THE CASE

Respondent, hereinafter called Defendant, cannot accept the "STATEMENT OF THE CASE" made by Petitioner, hereinafter called Plaintiff, for the reason that such statement is incomplete and inaccurate.

Plaintiff alleged three acts of primary negligence on the part of Defendant and Defendant alleged six acts of contributory negligence on the part of Plaintiff. Following the suggestion of the Fifth Circuit Court of Appeals in *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, the Trial Court submitted this case to the jury by a general charge with special interrogatories. The findings of the jury on these special interrogatories were as follows (T. 994):

1. That Defendant *was negligent* (d) in causing a string of cars to strike the diesel engine upon which DeLaCruz was working, and that the Defendant *was not negligent* (a) in failing to warn of the coupling and moving cars into the diesel engine on which Plaintiff was operating, (b) in failing to provide an adequate and safe system for warning Plaintiff of the railroad company's intention to move cars on the track on which Plaintiff was working, and (c) in failing to provide DeLaCruz with a safe place to work.
2. That one or more or all of such acts (those found in Special Issue 1) played any part, no matter how small, in actually bringing about or causing Plaintiff's injuries.
3. That Plaintiff *was negligent* (a) in failing to keep a proper lookout for his own safety, (c) in failing to place a blue flag or blue light warning

on the car or engine on which Plaintiff was working and (f) in placing himself in a hazardous position under or about the engine in question and that Plaintiff *was not negligent* (b) in failing to listen for the switch engine and cars on the track where the accident occurred, (d) in failing to notify the enginemen and firemen that the work was being done on the car or engine in question and (e) in failing to place a metal sign painted blue on the derail on the track in question.

4. That one or more or all of such acts (those found in Special Issue 3), played any part, no matter how small, in bringing about or causing Plaintiff's injuries.

5. That the extent to which the negligence of Plaintiff contributed to his injuries was 50%.

6. That the total damages of Plaintiff were $12,000.

Thus, the Trial Court felt that there was evidence to warrant the submission of these acts of contributory negligence on the part of Plaintiff. Following the return of the verdict, the Plaintiff contended before the Trial Court that there was no evidence to support the findings of the jury on the issues of contributory negligence, but once again the Trial Court disagreed and in accordance with the verdict of the jury, entered judgment on behalf of Plaintiff in the amount of $6,000.

Following the entry of judgment by the Trial Court, Plaintiff appealed to the Fifth Circuit Court of Appeals and contended among other things that there

was no evidence to support the findings of contributory negligence by the jury. The Fifth Circuit Court of Appeals in an opinion reported at 405 F.2d 459 carefully considered all of the contentions made by Plaintiff and concluded that the findings by the jury to the effect that both Plaintiff and Defendant were negligent, were not only justifiable, but entirely reasonable.

Plaintiff states on page 4 of his petition that the removal of the derails was contrary to the rules but this is simply not supported by the record. The undisputed testimony was to the effect that the derails were removed at 4:30 p.m. when the carmen finished their work on these tracks and the Plaintiff did not actually begin working on the diesel unit until about 6 p.m., as the diesel unit was not brought to the track until that time (T. 40).

REASONS FOR DENYING THE WRIT

I.

This Court has clearly stated in Rule 19, Supreme Court Rules, that a writ will be granted only where there are special and important reasons therefor. Plaintiff has failed in this regard in that the decision of the Court of Appeals in this case does not fall within any of the reasons stated in Rule 19(b), Supreme Court Rules.

II.

There is ample evidence to support the findings of the jury that Plaintiff was negligent. The jury found that Plaintiff was negligent in three respects as follows:

1. In failing to keep a proper lookout for his own safety.
2. In failing to place a blue flag or blue light warning on the car or engine on which Plaintiff was working.
3. In placing himself in a hazardous position under or about the engine in question.

Thus, the verdict is supported by evidence if there was any evidence to support any of these findings of the jury.

Before discussing specifically the evidence that does support these findings of the jury, Defendant wants to discuss and cite to the Court the authorities which control in the consideration of the question of the

sufficiency of the evidence to support these findings of the jury.

This Defendant and many other railroads have felt many times after a jury verdict that there was no evidence to support the finding of the jury to the effect that the Defendant railroad was guilty of acts of negligence. However, in numerous F.E.L.A. cases, this Court has emphasized time and again that the questions of negligence and causation are for the jury and not the Court. In the leading case of *Rogers v. Missouri Pacific Co.*, 352 U.S. 500 (1957), the Court made it plain that the basic intention of the Federal Employers Liability Act is to leave the fact-finding function on negligence exclusively in the jury in all but the infrequent cases where fairminded jurors could not honestly differ.

The decisions of the Supreme Court subsequent to *Rogers* clearly show that the Court fully intends to apply forcefully the principles expressed in *Rogers*. Time after time the Court has granted certiorari to reverse a lower court which had taken the case away from the jury either by directing a verdict or granting a judgment n.o.v. In the following illustrative cases, a jury verdict was overturned by the trial court or intermediate appellate court, only to be reinstated by the Supreme Court. See, e.g., *Davis v. Baltimore & Ohio Railroad*, 379 U.S. 671 (1965) (per curiam); *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963); *Dennis v. Denver & Rio Grande Western Railroad*, 375 U.S. 208 (1963) (per curiam); *Basham v. Pennsylvania Railroad*, 372 U.S. 699 (1963) (per

curiam); *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959), and the compilation of thirty such cases in the concurring opinion of Justice Douglas; *Webb v. Illinois Central Railroad*, 352 U.S. 512 (1957).

In holding that reversible error has been committed by a lower court's invasion of the function of the jury, this Court has relied on well established principles of law. It was early held in F.E.L.A. case law that the jury's verdict on the issue of negligence could be reversed "*only when there is a complete absence of probative facts to support the conclusion reached*" by the jury. *Lavender v. Kurn*, 327 U.S. 645, 653 (1945) (emphasis added). *Accord, Planters Manuf. Co. v. Protection Mut. Ins. Co.*, 380 Fed.2d 869, 874 (5th Cir. 1967) cert. denied, 389 U.S. 930. But whenever the evidence is such that fairminded men might draw differing inferences therefrom, there is an evidentiary basis for the jury's verdict, and the appellate court's function in that regard is exhausted. It is immaterial that the court might have chosen a contrary inference which it feels is more reasonable. Ibid. See also *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1941); *Wilkerson v. McCarthy*, 336 U.S. 53. Plainly these cases evidence a very restrictive view of the circumstances under which a jury verdict may be disregarded in F.E.L.A. cases. 2B *Barron & Holtzoff*, §1075 at 401.

These principles concerning the significance of the jury's verdict apply, of course, with equal force in all F.E.L.A. cases, no matter whether the jury happens to decide in favor of the employee or employer. They

apply also where the attack is being made on the findings of contributory negligence by the jury just the same as they apply to attacks upon the findings of primary negligence by the jury. This is made quite clear by the opinion in *Page v. St. Louis Southwestern Ry. Co.*, supra, as follows:

> "As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. *So far as negligence is concerned, the standard is the same-ordinary prudence-for both Employee and Railroad alike.* Unless a contrary result is imperative, it is, at best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative." (Emphasis added).

The effect of a finding of contributory negligence by the jury has been discussed in many cases. For instance in *Johnson v. Erie Railroad Co.*, 2nd Cir., 250 F.2d 283, the verdict in an F.E.L.A. case was for the defendant and the plaintiff appealed asking the appellate court to hold that plaintiff was not guilty of contributory negligence as a matter of law. Of course, this is the same contention being made by Plaintiff in this case and the court held as follows:

> "Plaintiff's assignment of error is based upon the judge's charge that the jury might consider whether he was guilty of contributory negligence in mitigation of damages. He asserts that on the facts he could not have been held negligent. But we cannot absolve him of negligence as a matter of law. At the time of his injury he was working

> in a stationary railroad car, stowing mail packages tossed to him from a truck alongside; and he was injured when a locomotive struck the car, throwing him against some hard object and thus injuring his leg. As said in Daulton v. Southern Pac. Co., 9 Cir., 237 F. 2d 710, 713: 'The lesson seems to be in Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668, that the jury can choose any reasonable hypothesis and that the rule works both ways.' The jury may have concluded that plaintiff should have taken some concern for a possible striking and the way in which he should fall, knowing, as he had to know (the car being sandwiched between two others on a spur track), the direction from which any blow must come. At least this does not seem too unreasonable an hypothesis for the jury to choose."

In considering the evidence to support the findings of the jury, the appellate court must take the evidence in the light most favorable to Appellee. This rule has been stated in *Barnes v. Norfolk Southern Railway Co.*, 4th Cir., 333 F.2d 192, as follows:

> "It is for the jury to draw inferences from the facts and 'only when there is a complete absence of probative facts to support the conclusion reached does reversible error occur.' Melville v. State of Maryland, 155 F. 2d 440 (4 Cir. 1946). This court must take the evidence in the light most favorable to the appellee where a jury verdict supports his position. Atlantic Greyhound Corp. v. Eddins, 177 F. 2d 954 (4th Cir. 1949)."

The rule is also stated by the 7th Circuit Court of Appeals in *Teets v. Chicago, South Shore & South*

Bend Railroad, 238 F. 2d 223, as follows:

> "When ruling on a motion by the defendant for a directed verdict the trial court may consider only the evidence favorable to the plaintiff and all reasonable inferences which the jury may draw therefrom which tend to support the plaintiff's case. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610. Under this standard the trial judge is precluded from passing on the credibility of witnesses or weighing the conflicting evidence Lavender v. Kurn, supra; Tennant v. Peoria & P.U. Ry. Co., supra. Thus, if there is a choice of conflicting versions of the way the accident happened, the decision as to which witness is telling the truth, and inferences to be drawn from uncontroverted as well as controverted facts are for the jury. Stanford v. Pennsylvania Ry. Co., 7 Cir., 171 F. 2d 632."

Plaintiff was an experienced machinist who had worked for Defendant for 16 years (T. 30). In the Amarillo yards, machinists work on locomotives and carmen work on boxcars and the work is generally done in different places (T. 190). The work on the locomotives is ordinarily done in the area of the roundhouse and the work on the boxcars is usually done in the area of the repair tracks where this accident occurred (T. 190). The machinists work three shifts so that work is done on the locomotives 24 hours a day (T. 191). However, this is not true with regard to the carmen as they work only one shift between

8 a.m. and 4:30 p.m. so that all of the repair work that is normally done on the repair tracks where this accident occurred generally terminates at 4:30 p.m. (T. 194). The drop pit where this accident occurred is normally used to change the wheels on passenger cars so that all work at the drop pit would normally be done during the daytime (T. 195).

During the time that carmen are working on the repair tracks they are protected by a blue flag derail and also by locked switches at either end of the tracks (T. 738). The switches are locked to prohibit any unauthorized switching of the tracks and the only way that they can be moved is by the yardmaster seeking permission from the foreman of the carmen to unlock the tracks and to have the blue flag derail removed (T. 738). If the blue flag derail is removed, then the workmen on the tracks are notified through a loud speaker and they are required to quit working and stay clear during that period of time (T. 739). At the close of the shift of the carmen at 4:30 p.m., the blue flag derails are removed and the switches are unlocked (T. 739). The cars that have been worked on during this daytime shift by the carmen are taken off of the repair and conditioning tracks by the switching crews during the nighttime and the tracks are refilled with cars to be worked upon the following day (T. 739). *If work is to be done on these tracks by the machinists between 4:30 p.m. and 8 a.m. the next morning, it is the responsibility of the machinist who is working on the track to protect himself* (T. 739-740). The machinist is to protect

himself by providing blue flag protection and to see that the switches are locked in order to assure that there is no switching movement coming into the track where the machinist is working (T. 740). In addition to the blue flag derail, there are also blue lights and blue flags (T. 740-741).

The Plaintiff testified that the Defendant had issued safety rules to be followed by carmen and machinists so that they would be protected in working on repair tracks (S.F. 207). Such rules are encompassed in a booklet called "Instructions for Locomotive, Car and Other Mechanical Department Employees" and such book was introduced into evidence as Defendant's Exhibit 7 (T. 211). The pertinent portions of such rule provide as follows beginning of page 3 of such book:

> "Mechanical Department employees will comply with Operating Department Rule 26, which reads: 'A blue signal, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen.
>
> When emergency repair work is to be done under or about cars in a train and a blue signal is not available, the engineman and firemen will be notified and protection must be given those engaged in making repairs.'

INSTRUCTIONS FOR LOCOMOTIVE, CAR AND OTHER MECHANICAL DEPARTMENT EMPLOYES.

A. The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Metal signs, painted blue, suspended from brackets or used in connection with derails on repair tracks, will be regarded as proper blue signals prescribed by Operating Department Rule 26.

Except as provided in the last paragraph of operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or about an engine, car or train until it is known that blue signals have been properly displayed.

When more than one class of these workmen are employed under or about an engine, car or train one set of blue signals will be used and an understanding reached by employes involved as to who will display and remove the blue signals. Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employe, who will then promptly remove the blue signals.

The Company does not require its employes to incur risks and directs them to exercise proper care and judgment to protect themselves.

B. On an engine, the blue signal must be displayed in the bracket provided for that purpose on the engineman's side.

On a train, the blue signal must be displayed on end hand-hold on the road engineman's side.

> On a car or cut of cars, the blue signal must be displayed on the end hand-hold at the left as the employe displaying the signal faces the end of the car." (Emphasis added).

In spite of the fact that Plaintiff knew that the switching crew would normally expect that there would be no machinists working on Repair Track No. 1, the evidence was undisputed that Plaintiff had not complied with the blue flag rule (T. 533 & 614). Plaintiff testified that he knew that the normal practices was for the derail and blue flag to go down when the carmen quit working in the afternoon so that the switchmen could move cars in and out of the various tracks before 8 a.m. the next morning (T. 201-202). In addition to this, although the accident according to Plaintiff occurred at about 9:30 p.m., he had been in the vicinity of the drop pit from 4 p.m. until the time of the accident and he saw the switching crews putting cars in and out of the various tracks that are known as the rip tracks (T. 206). Actually, the Plaintiff testified that he was in the area of the pit from 4 p.m. until the time the accident occurred at 9:30 p.m. (T. 206), but that the diesel engine was not brought to the pit until about 6 p.m. so that from 4 p.m. until 6 p.m., Plaintiff was just getting ready to work on the diesel unit (T. 225). Plaintiff was not working in the pit underneath the diesel engine until about 20 to 30 minutes before the accident occurred (T. 206), so that Plaintiff was well aware of the fact that the switching crew was moving cars in and out of the repair tracks.

Witness Bixenman testified that in accordance with the custom and practice, it would be the responsibility of Plaintiff to see that the blue flag was placed on the engine in order to protect the machinists (T. 575-576). Also, witness Luginbill testified that it was the responsibility of the machinist to see that the blue flag rule is complied with (T. 739-740).

Witness Wilson testified that at about 5 p.m. on the date of the accident, the same switching crew had been on Track No. 1 where the accident occurred and had pulled out the cars that had been worked on during the day (T. 591). He also testified that in switching of the type that they did on the repair track, they will frequently cut cars loose to run into other cars and put cars into other cars for the purpose of coupling (T. 611-612). This is the normal procedure unless a machinist has notified them that they are working on the track by putting out a blue flag in the daytime or a blue light at night which was not done in this case (T. 613).

Under the circumstances of this case, it would be an "undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, supra.

III.

There was ample evidence to support the finding of the jury that Plaintiff's negligence played a part in bringing about or causing Plaintiff's injuries.

The question of causation was for the jury and we again refer the Court to the cases cited under II above. Certainly the failure of Plaintiff to keep a proper lookout for his own safety contributed to this accident. Also, there is no question but what the act of Plaintiff in placing himself in a hazardous position under the engine without a determination that the blue flag derail had been put in place contributed to the accident in question and any injuries sustained by Plaintiff.

With regard to causation in failing to place a blue flag warning on the diesel engine in question, several witnesses testified with regard to the effect of this failure on the part of Plaintiff.

Witness Wilson testified that the crew did not know that there was a diesel engine at the other end of the track (T. 613) and if there had been a blue light out, then it would be a notice of danger to the crew in their switching on the tracks (T. 622).

Withess Daniel testified that he first saw the diesel engine while they were in the process of shoving cars into the repair track and that if there had been a blue light on the cars, he would have started all of what he did much sooner and in all likelihood, would have had it completed if the blue light had been placed as it should have (T. 666-667). Witness Luginbill testified

that if the blue flag derail had been up, the accident would not have occurred because the train would have been prohibited from coming into the track where the diesel engine was located (T. 777).

IV.

The Trial Court properly instructed the jury with regard to damages and properly reduced the finding of damages by the jury by 50 percent. In any event, Plaintiff has waived any right to complain of the action of the Trial Court in this regard because Plaintiff failed to object in any respect to this portion of the charge of the Court.

This case was submitted to the jury by a general charge with special interrogatories. Even though the Court was submitting the case on special interrogatories, the Court felt that the jury should be informed of the effect of their answers by a general charge and accordingly, instructed the jury in the first part of the charge on negligence and contributory negligence as follows:

> "For the Plaintiff to recover under the statute, it is sufficient if he proves by a preponderance of the evidence that the railway company, its agents or employees, other than the Plaintiff, was negligent and that its negligence in whole or in part caused the injuries, if any, to DeLaCruz.
>
> You are further instructed that if it is shown by a preponderance of the evidence that DeLaCruz was negligent and that his negligence in whole or in part caused his injuries, if any, the amount of damages, if any, *you find* in answer to Special

> Issue Number 6 will be reduced to the extent that you find from a preponderance of the evidence the negligence of DeLaCruz contributed to the injuries, if any, of DeLaCruz." (Emphasis added).

Undoubtedly, an instruction of this type informing the jury of the effect of their answer is beneficial to the Plaintiff and you can be sure that Plaintiff would have objected if the Charge had omitted such an instruction and in addition, you can be assured that Plaintiff would in jury argument so inform the jury of the effect of their answers even if the Court had not done so.

This portion of the Charge just quoted was on page 3-a and on page 7, completely separated from such instruction was Special Issue No. 6 which reads in its entirety as follows:

> "What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and fairly compensate Manuel O. DeLaCruz for the injuries, if any, sustained by him as a result of the occurrence in question?
>
> You are instructed that you may take into consideration the following elements and factors or such of the same, if any, as are proven, and no other:
>
> (a) Physical pain and suffering which he has suffered in the past from the date of the occurrence to the date of this trial, and in the future as he will reasonably and probably suffer in the future.

(b) Loss of earnings he has sustained in the past from the date of the occurrence to the date of this trial, and diminished capacity to work and earn money in the future as he will in reasonable probability sustain in the future.

(c) Reasonable and necessary doctors and hospital and medical expenses incurred in the past from the date of the occurrence to the date of this trial and which in reasonable probability will be incurred in the future.

Answer in dollars, if any, and cents, if any.

ANSWER $12,000."

Without question, Special Issue No. 6 clearly directed the jury as to the elements that they were to take into consideration in arriving at an amount. In no sense could the jury have concluded that they were to reduce their findings by any amount. Also, it is clear that the wording of the general instruction could not have been confusing to the jury as suggested by Plaintiff in view of the words "the amount of damages, if any, you find in answer to Special Issue No. 6 will be reduced" for the reason that this clearly tells the jury that whatever they find in Special Issue No. 6 will be reduced by the Court. We do not see how any other meaning could be concluded from such language.

However, if there was any confusion or ambiguity in this regard, the only complaint that Plaintiff would have on appeal would be that the Court erred in its Charge. No objections on behalf of Plaintiff to the

Charge of the Court are before this Court and therefore in accordance with Rule 51, Federal Rules of Civil Procedure, Plaintiff cannot complain of the instruction given by the Court.

RESPONSE TO PLAINTIFF'S REASONS FOR GRANTING THE WRIT

I.

Plaintiff asserts that this Court should grant the writ of certiorari because the ruling of the Court of Appeals in this case is contrary to the ruling of the Third Circuit Court of Appeals in *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996.

This contention of Plaintiff is based solely on the testimony of the Plaintiff to the effect that he did not place a blue light on the diesel engine in question because he had been told by his foreman that all of this had been taken care of.

It is true that this is the story that Plaintiff told to the jury at the trial, but Plaintiff failed to point out to the Court that this testimony was impeached. In the first place, Plaintiff had seen the switch engine move in and out of the repair track so that he knew that the blue flag derails were down. Also, after the accident occurred, Plaintiff gave a statement to his employer and at the trial, this statement was marked as Defendant's Exhibit 11 (T. 220). A portion of this signed statement of Plaintiff was read into evidence as follows (T. 223-224):

"Foreman Patterson instructed Machinist Jen-

> kins and I to change out the Number 1 idler wheels on Diesel engine 80-L on the drop pit on repair track and told me how they were going to move the engine to the pit *so I knew the yard would have to do this and felt sure knowing the work was to be done that we were going to be protected so I did not give any further thought to placing blue light or blue flag* on the engine as we had a portable floodlight set up shining on the engine, two big light bulbs on pole next to engine, cab lights, marker lights and engine room lights of engine burning and plenty of light around so the engine was clearly visible to anyone approaching it at all." (Emphasis added).

In this statement, Plaintiff very clearly states that he just assumed that they were going to be protected and he did not give any further thought to placing a blue flag or blue light on the engine. Certainly this contradicts his statement that he was specifically told by Foreman Patterson that the blue flag derail had been placed on the track. Under the evidence, the jury certainly had the right to disbelieve what the Plaintiff said in this regard and the rule is so stated in *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649 as follows:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co. 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCA (NS) 647; Lavender v. Kurn, 327 US 645, 90 L ed 916, 66 S Ct 740, supra. Once there is a reasonable basis in the

> record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 US p 652, 90 L ed 922, 66 S Ct 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044; Tiller v Atlantic Coast Line R. Co. 318 US 54, 68, 87 L ed 610, 618, 63 S Ct 444, 143 ALR 967."

Under these authorities, the jury could have completely discounted this testimony of Plaintiff about what he was told by Foreman Patterson. But even if this were not so and even if the jury believed what Plaintiff said, this would not excuse Plaintiff from his own failure to comply with the blue flag rule. Plaintiff relies entirely upon the case of *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996 and we submit that there are many distinctions in the two cases.

First, in *Paluch* it was undisputed that Plaintiff had been told by his foreman that the pole in question was safe.

Second, the plaintiff in *Paluch* was totally inexperienced in climbing poles, but Plaintiff DeLaCruz had been woking for Defendant Santa Fe in these same yards for 16 years, so that he was far from being inexperienced.

Third, the basis for contributory negligence in *Paluch* was the contention of defendant that plaintiff did not find the pole defective prior to the accident in question. The foreman had told plaintiff that the pole was safe and this is precisely the subject matter of the alleged contributory negligence. The same cannot be said about the case now before the Court when you consider the acts of contributory negligence and the alleged statements made by Foreman Patterson to Plaintiff.

The Fifth Circuit Court of Appeals had no trouble distinguishing *Paluch*, but even if it cannot be distinguished, the Fifth Circuit has followed the prior decisions of this Court. We have cited these decisions earlier beginning with *Rogers v. Missouri Pac. Co.*, 352 U.S. 500 and we need not cite them again. Plaintiff would assert that this case and those that followed held that a plaintiff should recover in every F.E.L.A. case. Instead, this Court has held that negligence, contributory negligence and causation should be decided by a jury and not by a Court. If this is good law when a plaintiff wins in the trial court, then it should be good law when the defendant wins in the trial court.

This very Defendant has been before this Court many times asserting that a jury finding of negligence on the part of the Defendant should not stand because of some rule of law concerning the duty owed by an employer to an employee at common law. For instance, in *Deen v. Gulf, Colorado and Santa Fe Ry. Co.*, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 718, a lower appel-

late court (*Gulf, Colorado & S.F. Ry. Co. v. Deen*, 275 S.W.2d 529) held that defendant Santa Fe was not liable to plaintiff because it had furnished to plaintiff a reasonably safe means of doing a job and had no duty to furnish another safe means of doing the same job. Undoubtedly this proposition of law was supported by ample evidence such as *Western Union Telegraph Co. v. Coker*, 146 Tex. 190, 204 S.W.2d 1977; *L&N Ry. Co. v. Davis*, 6th Cir., 75 F.2d 849; *Wolfe v. Henwood*, 8th Cir., 162 F.2d 998; *Fore v. So. Ry. Co.*, 4th Cir., 178 F.2d 349; *McGivern v. No. Pac. Ry. Co.*, 8th Cir., 132 F.2d 231; and *Thompson v. Pa. Ry. Co.*, 6th Cir., 88 F.2d 148. However, this Court chose not to follow those cases but instead, held:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

We submit that this same reasoning and holding should be made in this case irrespective of the holding of the Sixth Circuit in *Paluch v. Erie*, supra.

II.

Under this point, Plaintiff asserts that there is no causation between the contributory negligence of Plaintiff and the accident in question. In so doing, Plaintiff quotes from the Restatement of Torts and thereby asserts that Defendant had the burden of proving that the contributory negligence of Plaintiff was a "substantial factor in bringing about his harm."

Not only does Plaintiff feel that every plaintiff in an F.E.L.A. case should win, but is apparently now asserting that in order for this to be accomplished, the rules with regard to causation should be different for plaintiff and defendant.

Fortunately, the courts disagree. For instance, in this very case, the Trial Court submitted the causation issue with regard to contributory negligence in the following language:

> ". . . . played any part, no matter how small, in bringing about or causing Plaintiff's injuries."

Plaintiff made no objection at all to the submission of the causation issue in this matter and of course, it is well accepted that this is the standard to be used in instructing the jury both as to the primary negligence of Defendant and the contributory negligence of Plaintiff. This question was thoroughly considered by the Fifth Circuit in *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, and the Court very correctly concluded that the standard to be used on causation in both primary negligence and contributory negligence should be the same.

On page 11 of his Petition for Writ of Certiorari, Plaintiff quotes the testimony of a switchman and based upon this testimony Plaintiff asserts that the accident would have occurred even if there had been a blue light on the diesel engine. Plaintiff forgot to tell this Court that this same switchman on cross-examination testified as follows:

> "Q According to that statement, also, if there

had been a blue light on the cars, you would have started all of this much sooner, and in all likelihood would have had it completed or you could have given some warning earlier, if the blue light that should have been on there, was on there. Is that correct?

A That is right, sir." (T. 666-667).

III.

We have already pointed out that a careful reading of the Court's Charge shows that the Court did not in any respect instruct the jury to reduce the damages in any respect. The general instruction told them what would happen to their verdict and if the jury followed the Court's instructions, then the answer to Special Interrogatory No. 6 comprised the total amount of damages which the jury found that the Plaintiff had sustained.

CONCLUSION

Contrary to what Plaintiff asserts, this case does not present important questions which should be decided by this Court. If this Court should grant writ of certiorari in this case, then it would be an acknowledgment that this Court is once again going back to the practice of permitting appellate courts to determine issues of fact rather than the jury. This Court has steadfastly held to the proposition that only a jury is going to decide these issues since the decision in the *Rogers* case and we feel confident that this Court is not going to make an exception just because Defendant has won for a change. If the Court feels

that the evidence on contributory negligence of Plaintiff was weak, we suggest that the Court go back and read the evidence in other decisions by this Court where the Plaintiff has won in the trial court. These decisions are well known to this Court and certainly the Court will agree that in many of such cases, the inference of negligence was weak at best.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LUTHER HUDSON
JOE BRUCE CUNNINGHAM
HUDSON, KELTNER, SMITH
& CUNNINGHAM
1905 Continental Life Building
Fort Worth, Texas 76102
Attorneys for Respondent

Of Counsel:

LUTHER HUDSON

I certify that a copy of the foregoing Reply to Petition for Writ of Certiorari has been mailed on the 7th day of April, 1969 to Otto B. Mullinax, Mullinax, Wells, Mauzy, Levy & Richards, 1601 National Bankers Life Building, Dallas, Texas, Attorneys for Petitioner.

Luther Hudson